No. 08-

IN THE
Supreme Court of the United States

CRYSTAL PORTER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. §§ 471 & 472, which prohibit making or passing "counterfeit[]" obligations of the United States, require the Government to prove, and the jury to find, that a bill was not only fake, but also similar enough to genuine currency to deceive an honest and unsuspecting person of ordinary observation and care.

PARTIES TO THE PROCEEDING

Petitioner is Crystal Porter, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Crystal Porter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The opinion of the court of appeals is reported at 542 F.3d 1088 and is reprinted in the Appendix ("App.") hereto at 1a. The trial court's judgment is unreported and is reprinted at App. 24a.

JURISDICTION

The court of appeals issued its decision on September 16, 2008. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on December 4, 2008. App. 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 471 of Title 18 of the United States Code provides:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 472 of Title 18 of the United States Code provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or

> other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 473 of Title 18 of the United States Code provides:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

For more than fifty years, the federal courts of appeals have uniformly agreed that the federal statutes criminalizing the acts of making, passing, and dealing in "counterfeit" money require the government to prove more than that a putative bill is fake—the bill must also be capable of convincing an honest, sensible person that it is genuine. In other words, "Monopoly" money is not *real* money, but neither is it "counterfeit" money. At least not before the decision below.

In this case, a divided panel of the Fifth Circuit held that the federal criminal statutes that prohibit making (18 U.S.C. § 471) and passing (*id.* § 472) "counterfeit[]" money require only that the bills at issue bear *some resemblance* to genuine currency, but they need not bear a resemblance that would be reasonably convincing to anyone. The court of appeals thus affirmed petitioner's conviction in this case, even though the trial court refused to instruct

the jury to find not only that the bills passed by petitioner were fake, but also that they bore such a likeness to genuine currency as to be calculated to deceive an honest person, and even though no reasonable jury could find that the bills in this case so resembled genuine bills as to deceive an honest person. The instruction requested by petitioner was drawn directly from the settled construction of 18 U.S.C. § 473, which prohibits dealing in counterfeit currency. By holding that § 473's sister statutes include no such requirement, the decision below gives a fundamentally different meaning to the act of counterfeiting addressed in closely related statutes. And as the dissent below expressly acknowledged, the decision below creates a circuit conflict over the meaning of "counterfeit" in the two federal currency counterfeiting offenses at issue here. Certiorari should be granted.

A. Factual Background

Joey Barrett lacked the funds to settle a $300 debt with a drug dealer known as Carlos, and was persuaded to let Carlos make fake money on a photocopier owned by Barrett's common-law wife, Erica Horton. App. 2a. At Barrett's house, Carlos made color copies of each side of a genuine $100 bill on manila paper, glued the images together, and crumpled them for effect; Horton drew lines on the images to evoke the magnetic strips embedded in real $100 bills. *Id.*

The end result was predictably unimpressive, which raised the question of how they would get someone to accept the obviously fake money. Horton suggested that a Wal-Mart cashier she knew, 18-

year-old petitioner Crystal Porter, might help them pass the money. *Id.* at 2a-3a. For reasons unrelated to the making of the fake money, petitioner happened to visit Horton, giving Horton occasion to show her some unfinished bills and to ask whether she would accept them at her register as payment for Wal-Mart gift certificates. *Id.* at 3a. Petitioner looked at the fake bills and said, "Yeah, this will work." *Id.* The next day, Horton and Barrett went through petitioner's checkout line and exchanged the fake bills for $500 worth of Wal-Mart gift cards. *Id.* They used $300 worth of those to pay off Carlos.

It took Wal-Mart little time to discover the fake bills and trace them back to petitioner's register. The company alerted the local police, who went to petitioner's home and soon elicited an admission from her that she had agreed to accept the fake bills at her register despite knowing they were not genuine. *Id.* The matter was referred to federal authorities, who saw fit to charge petitioner under 18 U.S.C. § 371 with conspiring to manufacture and utter counterfeit obligations of the United States in violation of 18 U.S.C. §§ 471 & 472. *Id.*

B. Proceedings Below

At petitioner's trial, witnesses testified about the verisimilitude—or, rather, lack thereof—of the bills. Barrett testified that the "touch and texture" of the bills was off and that their "color [was] not even close to what a real U.S. 100-dollar bill looks like." Record Excerpts ("RE") 32.[1] Barrett characterized the

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[1] RE citations are to the Record Excerpts filed in the court of appeals.

money as being, in his mind, "like Monopoly money." RE 33. Horton testified that "no one would believe [the money] was genuine," and that because of "the way it looked" one "would have to know somebody" in order to pass it. RE 38. And a Secret Service agent testified that one could tell the money was not genuine in "a matter of seconds." RE 35.

Petitioner moved for a judgment of acquittal, arguing that the bills she allegedly conspired to pass were so insufficiently genuine-looking that no reasonable jury could find her guilty of the predicate counterfeiting offenses, 18 U.S.C. §§ 471 & 472. App. 3a-4a. The district court denied the motion. *Id.* at 4a. Petitioner then asked the district court to give jurors the following instruction defining "counterfeit," drawn from Fifth Circuit caselaw construing the remaining federal counterfeiting offense, 18 U.S.C. § 473:

> A bill is counterfeit only if it possesses similitude: it bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

App. 4a. The district court refused to give the proposed instruction, stating that it did not wish to "focus[] the jury's attention too much on the definition of counterfeit, because this is really a conspiracy case, not a counterfeiting case," and "there never need[s] to be a completed object crime in order for you to have a completed conspiracy." *Id.* The court instead simply instructed the jury that "[t]o be coun-

terfeit, a Federal Reserve note must have a likeness or resemblance to genuine currency." *Id.* at 5a. The jury found petitioner guilty of conspiracy to commit the offenses of making and passing counterfeit money under §§ 471 & 472. App. 6a.

The Fifth Circuit affirmed. The court first rejected petitioner's argument that the evidence was insufficient to sustain her conviction because the fake bills were not counterfeit. The court did not directly state *what* suffices as "counterfeit" within the meaning of §§ 471 & 472, but simply decided the jury had enough evidence to render a conviction. App. 9a.

Petitioner also argued on appeal that the district court erred in denying her proposed instruction on the meaning of "counterfeit," thwarting her principal defense: that while she may have conspired to make and pass *fake* bills, she did not conspire to make and pass *counterfeit* bills, because the specific bills she agreed to pass (the only bills she agreed to pass) were so plainly incapable of deceiving an honest, sensible, and unsuspecting person.

A divided panel disagreed. The majority acknowledged that petitioner had drawn her proposed instruction from Fifth Circuit caselaw addressing the "dealing" offense of § 473. App. 11a-12a; *see United States v. Scott*, 159 F.3d 916 (5th Cir. 1998). The court held, however, that §§ 471 & 472 differ materially from § 473.

Section 473, noted the court, has a specific intent requirement lacking in §§ 471 & 472—the perpetrator must deal in false obligations "with the specific *intent* that they be perceived 'as true and genuine.'" App. 13a (quoting 18 U.S.C. § 473). The court rea-

soned that the difference in intent leads to a "difference between the required level of similarity of the bogus bills to the genuine ones." *Id.* To "defraud by making or passing copies of an obligation of the United States does not require a particularly high level or degree of similitude," the court said, but, "[i]n stark contrast, to pass, publish, or use false obligations with the level of intent required under § 473 ... requires that the phony bills have a substantially greater level or degree of similitude to the genuine article." App. 13a. Thus, the court concluded, while petitioner's proposed instruction might have been necessary if a § 473 offense had been the object crime in the conspiracy charge, the instruction given was appropriate where §§ 471 & 472 offenses were the object crimes. App. 13a. The court said that the "substance of [petitioner's] proffered instruction was substantially covered by the trial court's charge," such that the instruction given was appropriate "even if we were to assume *arguendo* that [petitioner's] was a correct statement of law." *Id.* at 14a.

Judge Haynes dissented in part. He agreed with the majority that a properly instructed jury could find that the bills at issue qualified as "counterfeit" under §§ 471 & 472. App. 15a. He strongly disagreed, however, that the jury had been properly instructed on the meaning of "counterfeit" in those statutes. Petitioner's proposed instruction was a correct statement of the law under § 473, Judge Haynes noted, and he saw no basis for construing "counterfeit" differently under §§ 471 & 472. App. 16a-17a. Section 473's intent requirement "might necessitate a different instruction on intent," Judge Haynes ex-

plained, "but it does not change the meaning of the word 'counterfeit.'" App. 17a-18a. Judge Haynes further noted that the main circuit precedent construing § 473 itself had relied on caselaw interpreting "counterfeit" under § 472. App. 18a (citing *Scott*, 159 F.3d at 920-21). The "majority's distinction" between § 473, on the one hand, and §§ 471 & 472, on the other, Judge Haynes emphasized, "puts our circuit at odds with our sister circuits," which had defined "counterfeit" under §§ 471 & 472 just as petitioner proposed. App. 18a-19a.

Judge Haynes also disagreed with the majority's suggestion that petitioner's proffered instruction was substantially covered in the given charge: "Neither the district court's definition nor any other portion of its jury charge instructed the jury to what degree, if any, the fake bills had to resemble real money." *Id.* at 20a. And the failure to give the proposed charge seriously impaired Porter's ability to present her defense—"the essence of conspiracy is the agreement to commit a particular crime," Judge Haynes noted, and petitioner had proffered evidence that she had agreed only to pass a specific fake bill, as opposed to any other bill that might qualify as counterfeit, and the fake bills she agreed to pass were arguably "not sufficiently real to deceive someone." *Id.* at 21a-22a. While in Judge Haynes' view a reasonable jury *could* find these bills to be counterfeit, he considered it equally true that with petitioner's instruction "a reasonable jury could also find to the contrary." *Id.* at 22a. Petitioner may have conspired to commit a theft under state law, he concluded, but he thought a properly instructed jury could find that she committed no federal crime. *Id.* at 15a n.1, 22a.

REASONS FOR GRANTING THE WRIT

This case raises a simple question of statutory interpretation: Should the term "counterfeit" in the statutes criminalizing the *making* and *passing* of counterfeit money be defined as the identical term is defined under the statute prohibiting *dealing* in counterfeit money? Put differently, do the first two federal criminal statutes concern themselves with making or passing merely fake money, or with making or passing fake money that looks genuine enough to be confused with real money? The decision below conflicts with decisions of the nine other courts of appeals to have defined "counterfeit" under 18 U.S.C. §§ 471 & 472, which have uniformly held that the phrase carries the same meaning it does under § 473: "bear[ing] such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd in part on other grounds*, 338 U.S. 74 (1949). By breaking from the consensus interpretation of §§ 471 & 472, the Fifth Circuit's decision dramatically expands the scope of those offenses, and exposes individuals in that jurisdiction to criminal liability that would not attach anywhere else in the country.

The Fifth Circuit's decision is also wrong. Sections 471, 472, and 473 all have their roots in the 1790 first crimes act, Act of Apr. 30, 1790, § 14, ch. 9, 1 Stat. 112, 115, and were re-enacted together in their near-current forms in a single 1909 Act, Act of

Mar. 4, 1909, Pub. L. No. 60-350, §§ 148, 151, 154, 35 Stat. 1088, 1115-17. The "'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995) (quoting *Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The Fifth Circuit gives a variable meaning to "counterfeit" that cannot be discerned in the text or history of the Act that produced the three sister offenses of making, passing, and dealing in counterfeit currency. Nor does the Fifth Circuit's basis for distinguishing the offenses based on § 473's intent requirement make any sense, as Judge Haynes recognized. The nine other courts of appeals to have considered the question are correct in holding that "counterfeit" under §§ 471 & 472 means both fake *and* calculated to deceive an honest, sensible person.

Finally, this is a suitable vehicle for resolving that circuit conflict. At the very minimum, the pathetic quality of the fake bills in this case means that a jury properly instructed that the §§ 471 & 472 counterfeiting offenses require proof of convincing genuineness easily could have concluded that petitioner did not conspire to commit those offenses here. *See Salinas v. United States*, 522 U.S. 52, 65 (1997) (a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense"). Indeed, petitioner submits that a reasonable jury could conclude nothing else from the record in this case. The undeniable threshold problem, however, is that her jury was denied the chance even to consider her defense that she conspired only to pass specific bills

that did not qualify as "counterfeit" under the predicate offense statutes.

Certiorari should be granted.

A. The Decision Below Creates A Circuit Conflict On The Meaning of "Counterfeit" Under §§ 471 & 472

As the dissent below noted, the Fifth Circuit's holding conflicts with decisions of numerous other circuits defining "counterfeit" under §§ 471 & 472. According to the Fifth Circuit, the district court "sufficiently defined 'counterfeit'" in instructing the jury that "counterfeit" means "hav[ing] a likeness or resemblance to genuine currency." That instruction sufficed, the court explained, because the making and passing counterfeit currency offenses of §§ 471 & 472 are materially different from their sister § 473 offense of dealing in counterfeit currency. The special treatment of "counterfeit" in §§ 471 & 472 significantly expands the reach of those offenses, and creates a category of liability unique to the Fifth Circuit.

The definition of "counterfeit" that is now generally accepted and that petitioner sought in her proposed instruction was first applied to currency in *United States v. Weber*, 210 F. 973 (W.D. Wash. 1913). There, the court construed the provision now codified at 18 U.S.C. § 474, which forbids the possession of any "security made or executed . . . after the similitude of any obligation . . . of the United States, with intent to sell or otherwise use the same," in the face of an objection that the subject fake notes purported to be an obligation not of the United States

but of "the Bank of the Empire State" and "the Bank of Howardsville." The court reasoned:

> [I]t is not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States. Nor is it necessary that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men. *It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.* If the fraudulent obligation is of that character, the offense is made out, and whether such a similarity or resemblance exists is, in ordinary cases, a question of fact for the jury.

Id. at 976 (emphasis added) (construing § 150 of the March 4, 1909 Act).[2] The Third Circuit later adopted

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[2] The essence of the standard stated in *Weber* is actually much older. In *United States v. Sprague*, 48 F. 828 (D. Wis. 1882), for example, the court observed that to be fraudulent a bond must "bear[] such a likeness or resemblance to one of the genuine bonds of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest." *Id.* at 829 (quoting *United States v. Wilson* (E.D. Ark.; date unknown)). And in *United States v. Bogart*, 24 F. Cas. 1185 (N.D.N.Y. 1878) (No. 14617), the court stated, "[o]ne of the rules applicable to the offence of counterfeiting is, that the re-

that definition under what is now § 474 in *United States v. Lustig*, 159 F.2d 798 (3d Cir. 1947), and *Lustig* became the beacon for circuit and district courts construing the term "counterfeit" for the federal criminal counterfeiting offense statutes, including §§ 471, 472, and 473.

In *United States v. Smith*, 318 F.2d 94 (4th Cir. 1963), the Fourth Circuit held that the subject bills could not sustain a § 472 conviction because they were "an undisguised and rude forgery," and "not of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" *Id.* at 95 (quoting *Lustig*, 159 F.2d at 802). Following *Smith*, every other circuit to have addressed the issue has likewise applied the *Lustig* conception of counterfeiting to one of more of the three main federal counterfeiting offenses. *See United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970) (reversing § 472 conviction because a counterfeit obligation must be "calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest" (quoting *Weber*, 210 F. 973; citing *Lustig*, 159 F.2d 798, and *Smith*, 318 F.2d 94)); *United States v. Chodor*, 479 F.2d 661, 664 (1st Cir. 1973) (applying definition to convictions under §§ 472, 473, & 474); *United States v. Grismore*, 546 F.2d 844, 849 (10th Cir. 1976) (holding in § 472 case that *Lustig* formulation "is the proper jury instruction for the determination of that which is

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semblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution." *Id.* at 1185.

counterfeit"); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980) (adopting definition in § 473 case), *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981) (adopting definition for purposes of §§ 471, 472, & 474); *United States v. Cantwell*, 806 F.2d 1463 (10th Cir. 1986) (adopting definition for purposes of § 471); *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988) (adopting definition in reversing convictions under §§ 471 & 472 because the bills were "patently fake and [could not] fool 'an honest, sensible and unsuspecting person of ordinary observation and care'"); *United States v. Wethington*, 141 F.3d 284 (6th Cir. 1998) (adopting definition in § 472 case); *United States v. Taftsiou*, 144 F.3d 287, 290 (3d Cir. 1998) (adopting this definition in a case under §§ 472 & 473); *United States v. Scott*, 159 F.3d 916, 920-21 (5th Cir. 1998) (adopting this definition in § 473 case); *United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir. 2000) (*Lustig* definition of "counterfeit" is correct for cases under §§ 471, 472, & 473); *United States v. Collett*, 135 F. App'x 402 (11th Cir. 2005) (applying definition in § 471 case) *cf. United States v. Hall*, 801 F.2d 356, 358-60 (8th Cir. 1986) (noting correctness of definition for "counterfeit" under § 472, but noting that an *altered* obligation might not need to have the same degree of similitude); *United States v. Hammoude*, 51 F.3d 288, 294 (D.C. Cir. 1995) (stating, in a case involving 18 U.S.C. § 1546(a), that "[t]o pass as a counterfeit, an image must bear such a likeness to the original as 'is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care deal-

ing with a person supposed to be upright and honest'" (quoting *United States v. Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992))).[3]

Thus, nine courts of appeals—the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have adopted petitioner's construction of "counterfeit" for purposes of § 471. Four courts of appeals—the Fourth, Seventh, Tenth, and Eleventh Circuits—have applied it to § 472. And three circuits—the First, Third, and Eleventh—have held that the same definition applies to § 473 *and* either § 471 or § 472. Until the Fifth Circuit's decision, *none* of the courts of appeals ever suggested that § 473 stands alone on this point, and that some other conception of counterfeiting is appropriate for §§ 471 & 472.[4] That conflict warrants resolution by this Court.

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[3] The courts of appeals have also regarded the currency-counterfeiting definition as single in applying that definition to other counterfeiting provisions. *See, e.g., United States v. Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992) (observing that the "yardstick [for counterfeit currency] has routinely been applied to other documentary imitations").

[4] Several courts have speculated that §§ 471 & 472 is *narrower* than § 474, because the latter offense "is intended to cover a much broader range of counterfeiting enterprises than the predecessor statutes of sections 471 and 472," in that it governs securities made "in whole or *in part*" after the similitude of a U.S. security. *Johnson*, 434 F.2d at 829-30; *Chodor*, 479 F.2d at 664 n.3; *accord, e.g., Ross*, 844 F.2d at 190-91; *United States v. Harrod*, 168 F.3d 887 (6th Cir. 1999). No court has previously suggested that §§ 471 & 472 should be given a more *expansive* definition than either § 473 or § 474.

B. The Decision Below Incorrectly Construes The Meaning of "Counterfeit" Under §§ 471 & 472

1. The Constitution expressly grants Congress the power to punish "counterfeiting the Securities and current Coin of the United States," U.S. Const. art. I, § 8, cl. 6, and the first Congress wasted little time in executing that power. In its Act of April 30, 1790, Congress provided that if

> any person or persons shall falsely make, alter, forge or counterfeit ... any certificate, indent, or other public security of the United states, or shall utter, put off, or offer, or cause to be uttered, put off, or offered in payment or for sale any such false, forged, altered or counterfeited certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered forged or counterfeited ... every such person shall suffer death.

Act of Apr. 30, 1790, § 14, ch. 9, 1 Stat. 112, 115; *see Weems v. United States*, 217 U.S. 349, 399-400 (1910) ("By § 14 of the first crimes act (Art. April 30, 1790, ch. 9, 1 Stat. 115), forgery, etc., of the public securities of the United States, or the knowingly uttering and offering for sale of forged or counterfeited securities of the United States with intent to defraud, was made punishable by death."). Thus, from the earliest days of the Republic, it has been a federal crime to make, pass, or sell counterfeit currency.

The Constitution's Framers and the first Congress had an obvious reason for singling out for such emphasis the federal crime of counterfeiting U.S.

currency: to protect the nascent federal monetary system from the widespread circulation of genuine-looking but worthless notes, which would severely undermine public confidence in the value of the new Nation's currency. As this Court has observed, Congress's purpose in enacting the currency-counterfeiting offenses was "the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals." *Prussian v. United States*, 282 U.S. 675, 678 (1931); *see United States v. Turner*, 32 U.S. (7 Pet.) 132, 136 (1833) ("The object [of the 1816 act] is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank"); *Dunbar v. United States*, 156 U.S. 185, 193 (1895) (the purpose of § 472's predecessor was "the protection of the bonds or currency of the United States").

The substance of the federal counterfeiting offenses has remained essentially the same since 1790. Congress has revised the penalties over time, first reducing the punishment from death to ten years' imprisonment, *see* Act of March 3, 1825 § 17, ch. 65, 4 Stat. 115, 119, then increasing it to fifteen years' imprisonment, Act of June 30, 1864 § 10, ch. 172, 13 Stat. 218, 221. In 1909, Congress separated the offenses of making, passing, and dealing in counterfeit currency into distinct provisions with their own penalties. *See* Act of March 4, 1909, Pub. L. No. 60-350, § 148, 35 Stat. 1088, 1115 (making counterfeit obligations of the United States punishable by fifteen years of imprisonment); *id.* § 151, 35 Stat. at 1116 (passing counterfeited obligations of the United States punishable by fifteen years' imprisonment); *id.* § 154, 35 Stat. at 1117 (buying, selling, exchang-

ing, transferring, receiving, or delivering counterfeited obligations of the United States punishable by ten years' imprisonment); *see also United States v. Sacks*, 257 U.S. 37, 39-40 (1921) (describing the three provisions). Finally, in 1948, Congress enacted §§ 471, 472, & 473 as a trio in its consolidation of the federal criminal laws in Title 18 of the United States Code. Act of June 25, 1948, Pub. L. No. 80-772, §§ 471, 472, & 473, 62 Stat. 683, 705-06. Under the 1948 Act, whoever, "with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States" faced fifteen years in prison, *id.* § 471; whoever, "with intent to defraud, passes, utters, publishes, or sells ... any falsely made, forged, counterfeited, or altered obligation or other security of the United States" also faced fifteen years in prison, *id.* § 472; and whoever "buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine" faced ten years in prison, *id.* § 473.[5]

2. It is axiomatic that an Act of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Rather, a statute is understood to be "a symmetrical and coherent regulatory scheme . . . in which the operative words . . . should normally be given the same meaning." *Watson v. United States*, 128 S. Ct. 579, 584 (2007) (quoting *Gustafson*, 513

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[5] The current version of these offenses employs the same language to define each offense, but each is now punishable by 20 years' imprisonment. *See* 18 U.S.C. §§ 471, 472, 473.

U.S. at 569). It is thus a "standard principle of statutory construction" that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 127 S. Ct. 2411, 2417 (2007); *see Gustafson*, 513 U.S. at 570 (the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning" (quotation omitted). That maxim is "doubly appropriate" when the subject language "was inserted into [the statute] at the same time," *Powerex*, 127 S. Ct. at 2417, and perhaps triply so when identical words are used "in the same section of the same enactment," *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting) (emphasis deleted).

As noted, the making, passing, and selling of counterfeit currency was first criminalized in a single provision in 1790, and the crimes were enacted in their current forms in successive provisions of the 1909 Act. The language of each provision mirrors the others; § 471 prohibits "falsely mak[ing], forg[ing], counterfeit[ing], or alter[ing]" U.S. obligations, while §§ 472 & 473 prohibit passing or dealing in falsely made, "forged, counterfeited, or altered" U.S. obligations. It follows from the tight relationship between the three provisions that the key term "counterfeit" should be construed identically in all three provisions. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (particularly when provision refers back to identical term in preceding provision, the terms should be construed as the same).

3. The Fifth Circuit majority's contrary interpretation—treating "counterfeit" to mean merely "fake"

in §§ 471 & 472, while requiring proof of convincing genuineness under § 473—lacks merit. The court of appeals' theory turns on § 473's separate "intent" element, which requires proof that the alleged dealer of counterfeit notes intended them to be "passed" as genuine. Because a dealer must intend the "counterfeit" notes to be passed as genuine, the court of appeals reasoned, it makes more sense to construe the meaning of "counterfeit" itself in that context to require convincing genuineness. But as the dissent below recognized, the different, specific intent requirement of § 473 at most means that a § 473 charge requires a *different instruction on intent*, viz., that the defendant intended to pass the counterfeit note as genuine. There is no basis for reading the special intent element of § 473 back into the definition of "counterfeit" itself in § 473, thereby distinguishing it from the term as used in §§ 471 & 472. For decades courts have understood that "counterfeit" currency is a technical term meaning *more than* just fake money, but instead fake money made to appear so genuine as to deceive an honest and unsuspecting person. The special intent requirement applicable to those who deal in "counterfeit" currency does nothing to change the accepted understanding of what "counterfeit" currency is.[6]

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[6] What is more, §§ 471 & 472 also include an intent requirement: the person must make or pass counterfeit notes with the intent to defraud. In the vast majority of situations, a scheme to defraud by making or passing fake money will necessarily involve bills that look genuine enough to deceive. If the prescribed intent affects the definition of counterfeit, then, the term should have the same meaning for maker and passer liability as it does for dealer liability. And to the extent schemes

There is further reason to reject the Fifth Circuit's construction. As explained above, *supra* pp. 16-17, the currency-counterfeiting offenses exist to protect the monetary system from the circulation of fake-but-genuine-looking notes, not to punish individual frauds that do not reflect the kind of conduct that motivated the Framers to write the counterfeiting crime directly into the Constitution, and the first Congress to subject perpetrators to punishment by death. The threat to the monetary system from genuine-looking but worthless notes exists whether a defendant is making, passing, or dealing in the notes—confirming that the act of "counterfeiting" should be construed *in pari materia* for all three offenses.[7] And the threat is assuredly *not* present where, as here, "any school child, or the most illiterate person, would not be duped into accepting" as genuine the paper at issue, *United States v. Gellman*, 44 F. Supp. 360, 363 (D. Minn. 1942)—confirming that convincing genuineness is a foundational requirement for all three offenses.

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to defraud and other criminal acts—like simple theft—can be accomplished by using Monopoly money, as it were, there are plenty of criminal statutes available to punish and deter such behavior. The federal counterfeit offenses target the distinctly wrongful and especially dangerous act of using money that looks real enough to deceive someone, which is conduct that poses a specific threat to the nationwide monetary system. *See supra* pp. 16-17.

[7] Indeed, when the three offenses were first segregated into different provisions, § 471 & § 472 violations were punished more harshly than § 473 violations. *See supra* pp. 17-18. There is no reason to believe Congress considered the makers and users of amateurish false notes more culpable than the sellers of high-quality false notes.

In *Prussian*, this Court refused to enlarge § 471's predecessor to cover forged endorsements on government drafts, mindful that "strained construction[s]" are "inadmissible in the interpretation of criminal statutes." 282 U.S. at 677. The strained interpretation of §§ 471 & 472 adopted by the decision below likewise should not be permitted to subject individuals, including petty wrongdoers, to special federal criminal liability and punishment within the Fifth Circuit's boundaries.

C. This Case Is An Appropriate Vehicle For Clarifying The Definition Of Counterfeit In 18 U.S.C. §§ 471 & 472

This case presents a clean vehicle for resolving the circuit conflict created by the decision below. Because of the amateurish quality of the bills at issue in this case, a properly instructed jury could decide—indeed, petitioner submits, would be required to decide—that the bills petitioner agreed to accept did not qualify as "counterfeit," and thus could not support petitioner's conviction for conspiracy to make or pass counterfeit bills. The district court thought the conspiracy charge warranted a more general instruction so that the jury did not get caught up in the details of what is and is not counterfeit. But a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense," *Salinas v. United States*, 522 U.S. 52, 65 (1997), and if petitioner did not join a plan to make counterfeit money, she cannot be convicted of conspiring to violate §§ 471 & 472. This Court itself previously considered the meaning of § 471 in a case charging conspiracy to commit that object offense. *United States*

v. Janowitz, 257 U.S. 42, 43-44 (1921). It can and should do the same here.[8]

The panel majority's assertion that the given charge substantially covered petitioner's requested charge even "assum[ing] *arguendo* that hers was a correct statement of the law" (App. 14a) is patently wrong and presents no obstacle to review. As the dissent below pointed out, the charge given allowed the jury to convict petitioner on the theory that the bills merely had "a likeness or resemblance to genuine currency," even if the bills did not have even an outside chance of fooling anyone. App. 20a. "Neither the district court's definition [of counterfeit] not any other portion of its jury charge instructed the

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[8] There would be no merit in any suggestion that petitioner's conspiracy conviction may stand because she agreed to commit the object offenses of making and passing counterfeit bills and took overt steps toward accomplishing those objectives, even if the bills employed ultimately did not qualify as "counterfeit" under the traditional definition. That argument cannot save the conviction because petitioner's trial theory was that she at most agreed to make or pass *only* the amateurish bills, and because those bills were not "counterfeit," she did not conspire to commit the offenses of making and passing counterfeit bills. The decision below correctly recognizes that the poor-quality bills were the specific bills she conspired to pass (App. 8a-9a), and nothing in the record suggests otherwise. Accordingly, a properly instructed jury would have been entitled to agree with petitioner that whatever conspiracy she may have joined—perhaps a conspiracy "to commit simple theft," as the dissent proposed (App. 15a)—it was not a conspiracy to make and pass counterfeit bills. *See* App. 22a ("with Porter's jury instruction, a reasonable jury could also find . . . that the specific bills she agreed to pass were not sufficiently real to qualify as counterfeit"). The denial of her proposed instruction precluded that defense altogether.

jury to what degree, if any, the fake bills had to resemble real money." *Id.*

Finally, the court of appeals made plain its holding that §§ 471 & 472 define "counterfeit" differently from § 473. It is inconceivable that courts in the Fifth Circuit, or future Fifth Circuit panels, will consider themselves free to define §§ 471 & 472 as requiring proof of the same degree of genuineness required under § 473. The court of appeals' erroneous construction of §§ 471 & 472 is properly presented and should be reversed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A
COURT OF APPEALS OPINION

United States Court of Appeals,

Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Crystal PORTER, Defendant-Appellant.

No. 07-11005.

Sept. 16, 2008.

Susan B. Cowger, Dallas, TX, for Plaintiff-Appellee.

Stephen U. Baer, The Baer Law Firm, Dallas, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before SMITH, WIENER, and HAYNES, Circuit Judges.

WIENER, Circuit Judge:

Defendant-Appellant Crystal Porter was convicted by a jury under the generic conspiracy provisions of 18 U.S.C. § 371 (2000) for conspiring with others to *make* counterfeit obligations of the United States in violation of 18 U.S.C. § 471 and to *pass*

such obligations in violation of 18 U.S.C. § 472.[1] On appeal, Porter asserts two grounds for vacating her conviction: (1) The evidence adduced by the government was insufficient to support her conviction, and (2) the district court improperly instructed the jury on the meaning of "counterfeit." We affirm.

I. BACKGROUND

In the fall of 2005, Joey Barrett met a drug dealer named Carlos, also known as Cecilio, who supplied Barrett with $300 worth of methamphetamine. When Barrett was unable to pay for the drugs, Carlos began threatening Barrett, his common-law wife Erica Horton, and their children. To make the threats stop, Barrett and Horton agreed that Carlos could use Horton's combination photocopier/scanner/fax machine to make fake money as a way to pay off the drug debt.

Over a two-day period, Carlos and Horton made the bogus money at the residence shared by Barrett and Horton. First, Carlos color-photocopied each side of a genuine $100 bill onto manila paper, cut out the photocopied images, glued the opposing sides together, and crumpled the finished product. Horton then drew lines on the fake $100 bills to replicate the magnetic strips found on genuine $100 bills.

When Carlos asked Horton if she could pass the bills, she replied that she knew a Wal-Mart cashier

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[1] Neither Porter nor any of her co-conspirators were charged with violating or conspiring to violate 18 U.S.C. § 473, which differs from the object crimes under §§ 471 and 472 by criminalizing the acquisition or delivery of counterfeit obligations "with the intent that the same be passed, published, or used as true and genuine" (emphasis added).

named Crystal Porter, who might help. Later, when Porter came to the home with Horton's cousin, Horton showed Porter the phony bucks and asked if she would accept them at her cash register as payment for $500 worth of Wal-Mart gift certificates. Porter looked at the fake money and said, "Yeah, this will work."

The next day, Horton went through Porter's checkout line at Wal-Mart and bought $300 worth of gift certificates using the bogus $100 bills that she and Carlos had made. Barrett also went through Porter's checkout line and bought $200 worth of gift cards using more of the fake bills.

Wal-Mart's cash office discovered the fake bills, traced them back to Porter's cash register, then contacted the Seagoville (Texas) Police Department. Two days later, the police went to Porter's home; she answered the door and eventually told the police she was willing to cooperate. Porter admitted to the police that she had agreed to let Horton buy the Wal-Mart gift cards with the fake bills, and that when Horton and Barrett came through her checkout line the following day, she had accepted the bills despite knowing that they were not genuine.

Porter was indicted, tried, and convicted under 18 U.S.C. § 371 for conspiring with others to commit the object crimes of manufacturing and uttering counterfeit obligations of the United States in violation of 18 U.S.C. §§ 471 and 472. She was not charged with or tried for actually committing these or any other object crimes.

At the close of the government's case-in-chief, Porter moved for acquittal, contending that the in-

strument that she specifically agreed to assist in passing did not sufficiently resemble genuine currency to be counterfeit, thus making it legally impossible for her to have conspired to manufacture and utter counterfeit obligations. The court denied Porter's motion, stating that a "conspiracy offense is complete once the agreement is made and an overt act is committed by one or more of the co-conspirators during the existence of the conspiracy, whether or not the object crime is ever accomplished."

When the time came for the district court to instruct the jury, Porter requested that the district court use the following definition of counterfeit:

> A bill is counterfeit only if it possesses similitude: it bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

In rejecting Porter's proposed instruction, the court expressed concern for "focusing the jury's attention too much on the definition of counterfeit, because this is really a conspiracy case, not a counterfeiting case," and reiterated that "there never need [sic] to be a completed object crime in order for you to have a completed conspiracy." After the government's closing argument, Porter again urged the court to expand on the definition of counterfeit for the jury's benefit, but the court again declined to do so.

Following closing arguments, the district court instructed the jury as follows:

> The elements of the conduct prohibited by Section 471 are as follows:
>
> *First*: That a person made counterfeit Federal Reserve notes; and
>
> *Second*: That that person did so with intent to defraud, that is, intending to cheat someone by making the other person think that the Federal Reserve notes were real.
>
> . . .
>
> The elements of the conduct prohibited by Section 472 are as follows:
>
> *First*: That a person passed or uttered counterfeit Federal Reserve notes;
>
> *Second*: That that person knew, at the time, that the Federal Reserve notes were counterfeit; and
>
> *Third*: That that person passed or uttered the counterfeit Federal Reserve notes with intent to defraud, that is, with the intent to cheat someone by making that person think the Federal Reserve notes were real.
>
> . . .
>
> To be counterfeit, a Federal Reserve note must have a likeness or resemblance to genuine currency.

The district court derived this definition of "counterfeit" from the Fifth Circuit Pattern Jury Instructions for §§ 471 and 472, the notes of which are nearly identical. The note for the § 471 instruction states in relevant part:

> If there is an issue as to whether the money involved is so unlike the genuine that it may not be "counterfeit," the court should consider defining "counterfeit." The relevant Ninth Circuit pattern instruction states "[t]o be counterfeit, a bill must have a likeness or resemblance to genuine currency." Ninth Circuit Criminal Jury Instruction No. 8.22.

Apparently no Fifth Circuit case has defined "counterfeit" for purposes of § 471 [or § 472]. With respect to 18 U.S.C. *§ 473* (dealing in counterfeit obligations or securities), the Fifth Circuit has defined counterfeit as follows:

> A document is considered a counterfeit obligation or security of the United States if the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations of the United States as is *calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person who is supposed to be upright and honest. United States v. Scott*, 159 F.3d 916, 920-21 (5th Cir.1998).[2]

Porter reiterated her objection to the district court's definition of "counterfeit," but her objection was again overruled. After the jury convicted Porter, she timely filed a notice of appeal.

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[2] Fifth Circuit Pattern Jury Instruction (Criminal) § 2.24 (2001) (emphasis added).

II. ANALYSIS

A. Sufficiency of the Evidence

Porter contends on appeal that the evidence is insufficient to support her conspiracy conviction for two reasons: (1) The conspiracy to make and pass the fake money was completed before she formed an intent to commit a crime; and (2) as the fakes were not sufficiently similar to genuine bills, they were not "counterfeit," so she could not have joined a conspiracy to make and pass counterfeit money. The government counters that (1) Porter joined the conspiracy in Horton's home, before the conspiracy was completed, so that whether the fake money qualifies as counterfeit is irrelevant, and (2) the evidence at trial established all elements of a conspiracy beyond a reasonable doubt.

We review Porter's claim of insufficient evidence "to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Infante*, 404 F.3d 376, 384 (5th Cir. 2005) (quoting *United States v. Bellew*, 369 F.3d 450, 452 (5th Cir. 2004)). "[W]e must 'accept all reasonable inferences [that] tend to support the jury's verdict.'" *Id.* (quoting *United States v. McDow*, 27 F.3d 132, 135 (5th Cir. 1994)). "'The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence.'" *Id.* at 384-85 (quoting *United States v. Dadi*, 235 F.3d 945-50 (5th Cir. 2000)).

The crime of conspiracy is "separate and distinct from" the crime that is the object of the conspiracy. *United States v. Cantu*, 557 F.2d 1173, 1176-77 (5th Cir. 1977). To support a conspiracy conviction under § 371, the government must prove three elements: (1) an agreement between two or more people to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy's objective. 18 U.S.C. § 371; *see, e.g.*, *United States v. Williams*, 507 F.3d 905, 910 n. 4 (5th Cir. 2007), *cert. denied*, — U.S. —, 128 S. Ct. 2074, 170 L. Ed. 2d 810 (2008).

Porter correctly asserts that the government was required to prove that she entered into an agreement to pass counterfeit money, emphasizing that one witness described the fake bills in question as "Monopoly money." If the only evidence presented had been that Porter agreed to accept bills that looked like "Monopoly money," we would agree that the evidence was insufficient to support her conviction, but that simply is not the case.

First, the evidence showed that Horton, Barrett, and Carlos agreed to make fake $100 bills using Horton's photocopier, which created identical color reproductions of genuine $100 bills, and to use such phony bucks to purchase Wal-Mart gift cards. Second, Horton testified that Porter viewed the bogus $100 bills and expressly agreed to allow one or more of her co-conspirators to use them in the future to buy Wal-Mart gift cards at Porter's Wal-Mart cash register. Third, the trial court admitted the ersatz $100 bills manufactured by Carlos and Horton into

evidence. Even though Porter insisted that, to the touch, the fake bills felt nothing like the actual Federal Reserve Notes of which they were photostatic copies, the jury found otherwise; and it is the function of the jury to weigh competing evidence.

We are satisfied that the bills themselves constitute evidence from which a rational jury, properly instructed, could have found beyond a reasonable doubt that, while she was at the Barrett/Horton home on the day before she participated in the actual passing of the bogus instruments at the Wal-Mart where she worked, Porter affirmatively joined the ongoing conspiracy to *make* counterfeit obligations and thereafter to *pass* them. The evidence also demonstrates that there were multiple overt acts in furtherance of the conspiracy's objective, including the manufacturing of the fake bills and the enlisting of Porter to accept them, well before Porter actually accepted those instruments from Horton and Barrett at her Wal-Mart cash register.[3] We hold that the evidence was sufficient to support Porter's conviction under § 371 for conspiring with others to violate §§ 471 and 472.

B. Jury Instruction

Porter further contends that the district court abused its discretion when it refused to use her proposed definition of "counterfeit" in charging the jury.

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[3] Porter is responsible for overt acts completed before she joined the conspiracy. *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992) ("[I]t is settled law . . . that one who joins an ongoing conspiracy is deemed to have adopted the prior acts and declarations of conspirators, made after the formation and in furtherance of the conspiracy." (internal quotation marks omitted)).

Porter asserted at trial that, because she agreed to accept fake $100 bills at her cash register that were so unlike the genuine article as to be incapable of deceiving an honest, sensible, and unsuspecting person, the copies that she eventually accepted were not, by definition, "counterfeit." Thus, Porter contends that, even though she conspired to pass *fake* $100 bills, she did not conspire to pass *counterfeit* $100 bills. In essence, she argues that, by refusing to instruct the jury using her definition of counterfeit, the trial court denied her the opportunity to present her main defense to the jury. The government counters that (1) the similitude of the money is irrelevant to the charged crime of conspiracy to violate §§ 471 and 472, and (2) such similitude was not an issue in Porter's case and therefore required no more detailed instruction to the jury than the one given by the court.

We review a district court's denial of a proffered jury instruction for abuse of discretion. District courts enjoy substantial latitude in formulating jury instructions.[4] A district court abuses its discretion in denying a requested instruction only if such instruction (1) is a substantively correct statement of the law, (2) is not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense.[5] If the instruction sought fails to meet any one of these three conjunctive elements of the *Jobe* test, the trial judge acts within his

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[4] *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996).

[5] *Id.*

discretion in declining to accept that jury instruction. When, for purposes of today's inquiry, we first examine the second *Jobe* element, i.e., whether the proffered instruction was substantially covered in the given charge as a whole, we conclude that it was and end our inquiry at this point.

Porter contends that the district court's instruction failed adequately to define "counterfeit." As noted, the court instructed the jury that "[t]o be 'counterfeit,' the Federal Reserve Note must have a likeness or resemblance to genuine currency." Porter's proffered instruction defines counterfeit obligations as bills that "bear such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person who is supposed to be upright and honest." As shall be seen, a comparison of the differences between the court's instruction and the one proffered by Porter demonstrates the distinguishing differences between, on the one hand, the object crimes under §§ 471 and 472, which Porter was convicted of conspiring to violate, and, on the other hand, the object crime under § 473, under which she was never charged.

The district court was without explicit guidance in choosing how to instruct the jury on the meaning of counterfeit under the facts of this case. Although our jurisprudence has defined "counterfeit" for the purposes of § 473, it has not done so for §§ 471 and 472, the object crimes on which Porter's conspiracy charge was based. This dichotomy is reflected in the Fifth Circuit Pattern Jury Instructions, which both (1) reiterate the language of our § 473 jurisprudence

defining counterfeit for purposes of that section, and (2) incorporate by reference the Ninth Circuit Pattern Jury Instruction as derived from that circuit's case law defining counterfeit for purposes of §§ 471 and 472.[6] We observe, therefore, that because the object crimes underlying Porter's conspiracy charge relate to §§ 471 and 472, for which no original instructions defining "counterfeit" are found in our cases or in this circuit's Pattern Jury Instructions, the district court understandably chose to use the Ninth Circuit's definition of counterfeit for purposes of §§ 471 and 472, which is incorporated by reference in the Pattern Jury Instructions of this circuit. The Ninth Circuit provision is directly applicable to §§ 471 and 472, but the only Fifth Circuit pattern definition of counterfeit that comes directly from our case law is specifically applicable only to § 473. The district court chose the referentially incorporated Ninth Circuit definition of counterfeit and declined to use the definition of counterfeit from either our case law or Porter's proffered instruction, both of which define counterfeit in the context of § 473, which is not at issue here.

The propriety of the trial court's exercise of its discretion becomes apparent when viewed in the light of the differences between §§ 471 and 472 on the one hand and § 473 on the other. Section 471 criminalizes only the making, forging, counterfeiting or altering United States obligations or securities, and § 472 criminalizes only the passing, uttering, publishing, and selling, or the possessing or conceal-

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[6] Fifth Circuit Pattern Jury Instruction (Criminal) §§ 2.24 and 2.25.

ing, of such false obligations. In contrast, § 473 requires not only that the perpetrator acquire or dispose of such false obligations but that he do so with the specific *intent* that they be perceived "as true and genuine."[7] The difference between the intent required to violate § 473 and that required to violate §§ 471 and 472 is mirrored in the difference between the required level of similarity of the bogus bills to the genuine ones for the different object crimes. Merely to defraud by making or passing copies of an obligation of the United States does not require a particularly high level or degree of similitude. In stark contrast, to pass, publish, or use false obligations with the level of intent required under § 473, *viz.*, the specific intent that they be perceived by the recipient "as true and genuine," requires that the phony bills have a substantially greater level or degree of similitude to the genuine article.

If Porter had been charged with conspiring to violate § 473, her proffered charge, like the Fifth Circuit Pattern Jury Instruction for that specific section, might well have been necessary. As the object crimes underlying Porter's conspiracy are those covered by §§ 471 and 472, however, instructing the jury with the definition of counterfeit derived from the Ninth Circuit's pattern instructions and incorporated by reference by this circuit's pattern jury charges came well within the discretion of the trial court here.

As noted, if any one of the three conjunctive *Jobe* elements is not present, a trial court would be within its discretion in denying a proffered jury instruc-

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[7] 18 U.S.C. § 473 (2000).

tion.[8] We determined above that, because the object crimes for Porter's conspiracy were those enumerated in §§ 471 and 472, the district court sufficiently defined "counterfeit" in the instruction that it gave to the jury. It follows that the district court was equally within its discretion in declining to adopt Porter's proffered language. This would be so even if we were to assume *arguendo* that hers was a correct statement of law and that it concerned an important trial point of which the failure to instruct the jury could seriously impair their defense. As the substance of Porter's proffered instruction was substantially covered by the trial court's charge on the meaning of counterfeit, the other two prongs of the Jobe test are inapt and, thus, need not be addressed.

III. CONCLUSION

We are satisfied that the evidence was sufficient to support Porter's § 371 conviction for conspiring to violate §§ 471 and 472, and that the charge actually given to the jury, drawn as it was from the Fifth Circuit Pattern Jury Instructions for the object crimes underlying Porter's conspiracy charge, substantially and sufficiently covered the meaning of the term "counterfeit" and thus did not constitute an abuse of discretion by the district court. Accordingly, Porter's conviction is

AFFIRMED.

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[8] *United States v. Jobe*, 101 F.3d at 1059.

HAYNES, Circuit Judge, concurring in part and dissenting in part:

I generally concur in the majority's opinion with one exception. I agree with the majority's conclusion that the evidence supports a finding that Porter completed the crime of conspiracy at the Horton home, well before and independent of the events that occurred at Wal-Mart. For the reasons set forth below, I respectfully dissent from the portion of the majority's opinion affirming the district court's jury instruction on the definition of "counterfeit."

The majority correctly notes that the essence of a conspiracy is the agreement. This conclusion, however, begs the question of "an agreement to do what?" Porter had to agree to pass *counterfeit* bills, not just to commit simple theft.[1] Porter argued at trial that because she agreed to accept at her cash register $100 bills incapable of deceiving an honest, sensible, and unsuspecting person, the bills were not by definition "counterfeit." Thus, according to her, even though Porter conspired to pass *fake* $100 bills, she did not conspire to pass *counterfeit* bills. By refusing to instruct the jury using Porter's definition of counterfeit, Porter argues that the district court denied her the opportunity to present her main defense to the jury. The Government argues that the similitude of the money is irrelevant to the crime of conspiracy, was not an issue in Porter's case, and therefore required no more instruction to the jury than what was given.

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[1] This distinction is important because not every crime involving money is a federal crime. Undoubtedly, Porter conspired to commit theft, but that charge belongs in state, not federal, court.

The majority opinion correctly states the standard of review for jury instructions. A district court abuses its discretion in denying a requested instruction if the instruction: (1) was a substantively correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense. *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996). However, a judge has no discretion in determining the law, so whether the jury was properly instructed is a question of law this court reviews de novo. *See United States v. Guidry*, 406 F.3d 314, 321 (5th Cir. 2005).

1. Porter's proffered instruction was a correct statement of the law.

In *United States v. Scott*, 159 F.3d 916 (5th Cir. 1998), this court held that a note is counterfeit if it

> bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person who is supposed to be upright and honest.

Scott, 159 F.3d at 920-21. Porter's proffered instruction mirrored this court's definition of "counterfeit obligation" in *Scott*. *See id.* As the Government points out on appeal, *Scott* defined "counterfeit" for purposes of 18 U.S.C. § 473 (2001), which criminalizes the transfer of counterfeit obligations or securities. The Government gives no reason for defining

the word "counterfeit" differently in section 473 than in the almost identical sections at issue here-sections 471 and 472. The majority, however, does attempt to explain why *Scott*'s definition of "counterfeit" is exclusively applicable to section 473:

> The difference between the intent required to violate § 473 and that required to violate §§ 471 and 472 is mirrored in the difference between the required level of similarity of the bogus bills to the genuine ones for the different object crimes.... [T]o pass, publish, or use false obligations with the level of intent required under § 473, *viz.*, the specific intent that they be perceived by the recipient "as true and genuine," requires that the phony bills have a substantially greater level or degree of similitude to the genuine article.

Thus, the majority suggests that the three sections' different intent requirements justify the district court's use of a "counterfeit" definition other than the one articulated by this court in *Scott*.

The majority's distinction is problematic in two respects. First, section 473 requires an intent to pass false obligations as "true and genuine," whereas sections 471 and 472 require "an intent to defraud." This slight difference in the intent requirement might necessitate a different instruction on intent,[2]

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[2] Intent focuses on the defendant's subjective mental state. Whether a fake bill could actually deceive an unsuspecting, honest person, on the other hand, is an objective inquiry.

but it does not change the meaning of the word "counterfeit."[3]

Second, the majority cites no opinion, in this circuit or any other, which states that the definition of "counterfeit" is different among sections 471, 472, and 473. This court in *Scott*, when defining "counterfeit" for purposes of section 473, cited a case which in turn relied on a Fourth Circuit case defining "counterfeit" for purposes of section 472, one of the very sections at issue here. *Scott*, 159 F.3d at 920-21 (citing *United States v. Turner*, 586 F.2d 395, 397 (5th Cir. 1978) (citing *United States v. Smith*, 318 F.2d 94, 95 (4th Cir. 1963))). Not even the Fifth Circuit Pattern Jury Instructions, upon which the majority relies to find that the district judge did not abuse his discretion, purport to limit *Scott*'s definition of "counterfeit" to jury instructions only pertaining to section 473. Instead, they explicitly suggest using *Scott* 's definition for jury instructions pertaining to either section 471 or 472.[4] Indeed, the major-

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[3] It is worth noting that the district judge never purported to base his ruling on the different intent requirements articulated by sections 471, 472, and 473.

[4] The Fifth Circuit Pattern Jury Instructions also reference the Ninth Circuit Pattern Jury Instructions which are the source of the "likeness" language used by the district court. Pattern jury instructions are not law, and the Ninth Circuit pattern instructions cite no law in support of the "likeness" language. *See United States v. Williams*, 20 F.3d 125, 132 (5th Cir. 1994) (providing that while the Pattern Jury Instructions provide a useful guide for the district courts, they are not law). Even the Ninth Circuit itself uses Porter's definition, not the one suggested by the Ninth Circuit Pattern Jury Instructions. *United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970). Interestingly, neither the Fifth nor the Ninth Circuit's Pattern Jury Instructions suggest that section 473 should be handled

ity's distinction puts our circuit at odds with our sister circuits that have defined "counterfeit" for purposes of sections 471 and 472 just as our court defined the term in *Scott*.[5]

In sum, to the extent that the majority contends *Scott*'s definition of counterfeit exclusively applies to section 473, I respectfully disagree.

2. Porter's proffered instruction was not substantially covered in the charge as a whole.

The majority holds that the proffered instruction was substantially covered in the given charge. Simply by looking at the given instruction on the general meaning of "counterfeit" and the rest of the charge as a whole, it is clear that Porter's proffered instruction was not substantially covered. Porter's instruction articulated a specific standard under which the jury could determine if the fake bills contemplated to be used by the alleged conspirators appeared sufficiently genuine to be counterfeit. Specifically, Porter's instruction would have limited counterfeit obligations to include only those bills so similar to genu-

---

differently from sections 471 and 472. The only implication to be derived from the Fifth Circuit Pattern Jury Instructions is that its authors thought that section 473 was sufficiently similar to serve as a blueprint for defining "counterfeit" in jury instructions pertaining to sections 471 and 472.

[5] *See, e.g.*, *United States v. Mousli*, 511 F.3d 7, 15 (1st Cir. 2007); *United States v. Taftsiou*, 144 F.3d 287, 291 (3d Cir. 1998); *United States v. Wethington*, 141 F.3d 284, 287 (6th Cir. 1998); *United States v. Ross*, 844 F.2d 187, 189 (4th Cir. 1988); *United States v. Cantwell*, 806 F.2d 1463, 1471 (10th Cir. 1986); *United States v. Hall*, 801 F.2d 356, 357-58 (8th Cir. 1986); *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981); *United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970).

ine currency as to deceive an honest, sensible and unsuspecting person.[6] But the district court instructed the jury that to be counterfeit, a Federal Reserve note must simply have a likeness or resemblance to genuine currency.[7] Neither the district court's definition nor any other portion of its jury charge instructed the jury to what degree, if any, the fake bills had to resemble real money.

3. Porter's proffered instruction concerned an important point in the trial such that the district court's denial seriously impaired Porter's ability to present her defense.

The very experienced and capable district judge in this case intentionally limited the amount of attention the jury charge gave to the object crimes' counterfeit elements so that the jury would remain focused on the sole conspiracy charge that was the subject of Porter's trial. But he nonetheless chose to provide an explanation of the term "counterfeit." The problem here is that the district court's instruction overlooked an important distinction. Because Porter was tried only for conspiracy, the Government argues that an instruction correctly defining the word "counterfeit" did not concern an important

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[6] Porter's requested instruction stated:

> A bill is counterfeit only if it possesses similitude: it bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

[7] The pertinent portion of the jury charge stated only: "To be counterfeit, a Federal Reserve note must have a likeness or resemblance to genuine currency."

point of the trial, and nothing more than a general description of the term was required.

Yet the essence of a conspiracy is the agreement to commit a particular crime. *United States v. Jimenez Recio*, 537 U.S. 270, 274, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003); *see also United States v. Binetti*, 552 F.2d 1141, 1142 (5th Cir. 1977) (reversing a defendant's conviction for conspiracy to possess and distribute cocaine when the defendant did not conspire to sell cocaine, but rather a harmless, lawful substance that looked like cocaine). It is part of the Government's burden to prove that "'the intended future conduct [the conspirators] agreed upon includes all the elements of the substantive crime.'" *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (quoting *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978)); *see also United States v. Foote*, 413 F.3d 1240, 1250 (10th Cir. 2005); *United States v. Warshawsky*, 20 F.3d 204, 209 (6th Cir. 1994); *United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983) (explaining that while failure to instruct on the substantive elements of the object crimes is not always plain error, such an omission by the trial court does constitute a serious error when a defendant raises a question as to the elements of the substantive crime that was the object of the conspiracy).

In 99 out of 100 cases, the distinction between the "likeness" definition given and the "calculated to deceive an honest person" definition requested and refused, would be a distinction without a difference. Here it is not. Erica Horton testified on cross-examination to a day-by-day breakdown of the conspiracy. She explained that on Day 1, Carlos came to her home and made the fake $20 bills. On Day 2,

Carlos came to her house and made the fake $100 bills, finished and left. After he left, Porter came over, Horton showed her the finished $100 bill, and Porter said "Yeah, this will work." This is the evidence suggesting Porter agreed to pass a *specific* fake bill, one that she had seen, one that she was familiar with, and one that either did or did not meet the definition of "counterfeit." Consequently, whether this specific fake bill (either itself or as an exemplar of the fake bills intended to be used) was counterfeit is relevant as to whether Porter conspired to pass a counterfeit bill. These bills were color copies of the front and back of actual bills; they undoubtedly had a "resemblance" to real money. But arguably they did not feel like real money and were, therefore, not sufficiently real to deceive someone.

Even with Porter's proffered jury instruction, a reasonable jury could still find that she conspired to pass counterfeit money, which is why I concur in the conclusion that sufficient evidence supported a verdict of guilty. But with Porter's jury instruction, a reasonable jury could also find to the contrary—that the specific bills she agreed to pass were not sufficiently real to qualify as counterfeit. At the very least, the jury could have a reasonable doubt. For this reason, the district court should have given Porter's proffered instruction, and its failure to do so seriously impaired her ability to present her defense to the jury.

Accordingly, I respectfully dissent as to the portion of the majority's opinion finding that the district court's jury charge defining the term "counterfeit" did not constitute an abuse of discretion by the

district court. I would reverse and remand for a new trial.

APPENDIX B

DISTRICT COURT JUDGMENT

United States District Court
Northern District of **Texas—Dallas**

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	
CRYSTAL PORTER	Case Number: **3:07-CR-057-G(03)**
	USM Number: **36217-177**
	Stephen U. Baer Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) **1 of the 3 count Indictment filed February 22, 2007** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 371 (18 USC §§ 471 & 472)	Conspiracy to Manufacture and Utter Counterfeit Obligations of the United States	December 16, 2005	1

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 21, 2007
Date of Imposition of Judgment

/s/ A. Joe Fish
Signature of Judge

A. JOE FISH,
CHIEF JUDGE
Name and Title of Judge

September 25, 2007
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **TIME SERVED**.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be supervised for a term of: **TWO (2) YEARS**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide to the U.S. Probation Officer any requested financial information.

The defendant shall participate in mental health treatment services as directed by the U.S. Probation Officer until successfully discharged. These services may include prescribed medications by a licensed physician.

Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall pay any remaining balance of restitution, joint and several with co-defendants Erica Horton and Joey Barrett, in the amount of $500.00, payable to the United States District Clerk, 1100 Commerce, 14th Floor, Dallas, Texas 75202, for disbursement to:

Bennett & Delony Attorneys at Law
P.O. Box 69
Midvale, Utah 84047
Walmart-Seagoville Store/Erica Horton - 12/14/2005

If restitution is not paid immediately, the defendant shall make payments on such unpaid balance beginning 30 days following date of judgment at the rate of at least $100.00 per month until the restitution is paid in full. Further, it is ordered that interest on the unpaid balance is waived pursuant to 18 USC § 3612(f)(3).

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall

abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 100.00**	**$**	**$ 500.00**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Restitution Ordered	Priority or Percentage
Bennett & Deloney Attorneys at Law P.O. Box 69 Midvale, Utah 84047 Walmart-Seagoville	**$500.00**	

Store/Erica Horton -
12/14/2005

TOTALS: $ 500.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____, due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments on such unpaid balance beginning 30 days following date of judgment at the rate of at least $100.00 per month until the restitution is paid in full.

It is ordered that the defendant shall pay to the United States a special assessment of $100 for Count 1 which shall be paid immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

3:07-CR-057-G(01) Erica Horton

3:07-CR-057-G(02) Joey Barrett

☐ The defendant shall pay the cost of prosecution

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

Payment shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

CLOSED

Case Number: 3:07-CR-057-G

Date: September 25, 2007

Trial: Yes: X

No: _____

APPENDIX C

COURT OF APPEALS ORDER DENYING REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-11005

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CRYSTAL PORTER

Defendant - Appellant

U.S. COURT OF APPEALS
FILED
Dec. 04 2008
CHARLES R. FULBRIDGE
III - CLERK

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion 9/16/08, 5 Cir., _____/_____F.3d _____)

Before SMITH, WIENER, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the Panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Wiener
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES
41 FOR STAY OF
THE MANDATE

REHG-6a

OPPOSITION BRIEF

129

(2)

No. 08-1109

In the Supreme Court of the United States

CRYSTAL PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOSEPH F. PALMER
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Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether petitioner's proposed jury instruction on the degree to which a fake bill must resemble genuine currency to qualify as "counterfeit" was adequately covered by the jury instructions explaining that a counterfeit bill must have a likeness or resemblance to genuine currency and that petitioner must have intended to make another person think the note was real.

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In the Supreme Court of the United States

No. 08-1109

CRYSTAL PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 542 F.3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. A petition for rehearing was denied on December 4, 2008 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on March 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to manufacture and utter coun-

terfeit obligations of the United States, in violation of 18 U.S.C. 371, 471, and 472. Petitioner was sentenced to time served, to be followed by two years of supervised release.

1. In late 2005, Joey Barrett owed his drug dealer, Carlos, $300. Pet. App. 2a. Barrett and his common-law wife, Erica Horton, agreed to pay off the debt by allowing Carlos to use their computer and color photocopier/scanner to make counterfeit money. *Ibid.* Horton knew that petitioner worked as a cashier at Wal-Mart, and the group planned to use the counterfeit notes to buy gift cards at petitioner's register. *Id.* at 2a-3a; Gov't C.A. Br. 3.

Over a two-day period in December 2005, Carlos and Horton fabricated the money. Pet. App. 2a; Gov't C.A. Br. 3. Petitioner came over while Carlos and Horton were making the money. Pet. C.A. Br. 9; Gov't C.A. Br. 3. Horton showed petitioner some fake bills and described the plan to pass counterfeit money at her register. Pet. App. 3a; Pet. C.A. Br. 9. Petitioner agreed to participate, saying, "Yeah, this will work." Pet. App. 3a; Gov't C.A. Br. 3.

Barrett and Horton went through petitioner's checkout line at Wal-Mart and bought $500 worth of gift cards with counterfeit $100 bills that Horton and Carlos had made. Pet. App. 3a. Wal-Mart's cash office detected the counterfeit bills, traced them to petitioner's register, and called the police. *Ibid.* The police went to petitioner's house, and she agreed to cooperate. *Ibid.* Petitioner told the police that Barrett and Horton had passed the bills. *Ibid.*; Gov't C.A. Br. 4. Petitioner, Barrett, and Horton all went to the police station and gave written statements to the police and to the United States Secret Service. *Ibid.* In her written statement, peti-

tioner admitted that she had seen fake $20 bills at Horton's house, that Horton had asked her for a genuine $50 or $100 bill to use as a model, and that she had agreed that Horton could buy gift cards with counterfeit money from her checkout line at Wal-Mart. *Ibid.*; Pet. App. 3a.[1]

2. On February 22, 2007, a federal grand jury indicted petitioner along with Barrett and Horton. Pet. C.A. Br. 8. Petitioner was charged with one count of violating 18 U.S.C. 371, by conspiring with Barrett and Horton to commit certain offenses against the United States (specifically, making and passing counterfeit obligations of the United States in violation of 18 U.S.C. 471 and 472). Pet. App. 1a-2a. Unlike her co-conspirators, petitioner was not charged with substantive counts of making or passing counterfeit currency in violation of 18 U.S.C. 471 or 472.[2] Horton pleaded guilty to the conspiracy in violation of Section 371 and to substantive counts of making and passing counterfeit money in violation of both Section 471 and Section 472. *United States* v. *Horton*, No. 3:07-CR-57-G(01) (N.D. Tex. Sept. 10, 2007). Barrett pleaded guilty to the conspiracy and to a sub-

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[1] As petitioner repeatedly noted in her opening brief in the court of appeals, the trial testimony indicated that, when petitioner agreed to participate in the scheme, she had not seen the fake $100 bills that were ultimately used. See Pet. C.A. Br. 9, 10, 15; see also Gov't C.A. Br. 10 (also noting that petitioner "saw only incomplete bills").

[2] Section 471 provides as follows: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. 471.

Section 472 provides for the same punishment of "[w]hoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent * * * keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States." 18 U.S.C. 472.

stantive count of passing counterfeit money in violation of Section 472. *United States* v. *Barrett*, No. 3:07-CR-57-G(02) (N.D. Tex. Sept. 10, 2007). Petitioner went to trial. Pet. App. 3a.

After the close of the government's case, petitioner moved for a judgment of acquittal. Pet. App. 3a. She contended that the money did not have a sufficient likeness to genuine currency to be "counterfeit." *Id.* at 3a-4a. The district court denied the motion on the ground that a "conspiracy offense is complete once the agreement is made and an overt act is committed by one or more of the co-conspirators during the existence of the conspiracy, whether or not the object crime is ever accomplished." *Id.* at 4a.

Following closing arguments, the district court instructed the jury on the elements of conspiracy and the elements of the object crimes of making and passing counterfeit currency. Pet. App. 5a. The instructions on the object crimes included the requirement that the defendant acted with "intent to defraud, that is, intending to cheat someone by making the other person think that the Federal Reserve notes were real." *Ibid.* (Section 471 instruction); see also *ibid.* (nearly identical phrasing of instruction for Section 472). The court further instructed the jury that, "[t]o be counterfeit, a Federal Reserve note must have a likeness or resemblance to genuine currency." *Ibid.*

Petitioner requested that the district court expand the definition of "counterfeit" in its instructions on the object crimes of the conspiracy to include the following language:

> A bill is counterfeit only if it possesses similitude: it bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible

> and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

Pet. App. 4a. The district court declined to use petitioner's proposed language. *Ibid.* The district court was concerned that petitioner's language would inappropriately focus the jury's attention on whether the bills that were actually passed appeared sufficiently genuine to qualify as counterfeit. *Ibid.* The court explained that because the evidence showed that petitioner agreed to accept fake money before the bills were completed and passed, the conspiracy was complete even if petitioner's co-conspirators never succeeded in their efforts to make and pass counterfeit money. Gov't C.A. Br. 6-7. The district court also explained that further elaboration on the definition of counterfeit would "confuse the jury" by focusing its attention on whether petitioner's co-conspirators succeeded in making and passing counterfeiting money rather than on whether petitioner conspired with them to do so. *Id.* at 7.

3. On appeal, petitioner challenged the sufficiency of the evidence on her conspiracy conviction, claiming that the fake bills were not sufficiently similar to genuine bills to be "counterfeit," and thus that she could not have participated in a conspiracy to make and pass counterfeit money. Pet. App. 7a. The court of appeals rejected that claim, noting that petitioner's co-conspirators agreed to make "identical color reproductions of genuine $100 bills," that petitioner affirmatively joined "the ongoing conspiracy," and that "there were multiple overt acts in furtherance of the conspiracy[] * * * well before [petitioner] actually accepted" the fake bills at Wal-Mart. *Id.* at 8a-9a.

The court of appeals also rejected petitioner's contention that the district court abused its discretion by failing to use her proposed language on the degree of "similitude" a bill must possess to qualify as "counterfeit." Pet. App. 9a-14a. The court concluded that, even assuming *arguendo* that petitioner's definition was a correct statement of the law and that failure to instruct on that issue would have seriously impaired petitioner's defense, the district court did not abuse its discretion because petitioner's proffered instruction was "substantially covered" by the instructions "as a whole." *Id.* at 10a-11a. The court of appeals noted that the definition of "counterfeit" used by the district court came from the Fifth Circuit Pattern Jury Instructions for making or passing counterfeit notes under Section 471 or 472 (which incorporated by reference a Ninth Circuit Pattern Jury Instruction), while petitioner's proposed definition came from the pattern instruction for dealing in counterfeit notes under Section 473, which was not one of the object crimes of petitioner's conspiracy.[3] *Id.* at 11a-13a. The court of appeals further noted that Section 473 contains a specific intent requirement that is not found in Section 471 or 472, and that, because of that requirement, petitioner's more detailed instruction on the degree of similitude "might well have been necessary" if she had been charged with conspiring to violate Section 473. *Id.* at 13a. The court concluded, however, that, in this case, the substance of petitioner's proposed instruction was adequately covered by the district

[3] Section 473—which is entitled "Dealing in counterfeit obligations or securities"—applies to anyone who "buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine." 18 U.S.C. 473.

court's instructions as a whole, which explained—per the pattern instruction—that a counterfeit bill must have a likeness or resemblance to genuine currency. *Id.* at 4a, 13a-14a.

Judge Haynes concurred in part and dissented in part. Pet. App. 15a-23a. She agreed with the majority's conclusion that the evidence showed that petitioner "completed the crime of conspiracy * * * well before and independent of" her physical acceptance of the fake bills at Wal-Mart. *Id.* at 15a. Judge Haynes dissented, however, from the majority's ruling that the district court did not abuse its discretion in refusing to give petitioner's proposed jury instruction. She acknowledged that, "in 99 out of 100 cases," the difference between the jury charge and petitioner's requested language "would be a distinction without a difference." *Id.* at 21a. Nevertheless, she reasoned that petitioner's proposed instruction was necessary because petitioner may have agreed to pass only "a *specific* fake bill * * * that she had seen." *Id.* at 22a. Judge Haynes acknowledged that the bills in question "had a 'resemblance'" to genuine currency under the district court's definition, and that, even under petitioner's "proffered jury instruction, a reasonable jury could still find that [petitioner] conspired to pass counterfeit money." *Ibid.* She concluded, however, that because the bills "arguably * * * did not feel like real money," the jury "could have a reasonable doubt" about whether "the specific bills she agreed to pass" were "sufficiently real to qualify as counterfeit." *Ibid.*

ARGUMENT

Petitioner renews (Pet. 16-22) her contention that the district court abused its discretion in declining to

give her proposed jury instruction about the degree to which a fake bill must resemble real money to qualify as "counterfeit" under 18 U.S.C. 471 or 472. She further contends (Pet. 11-15) that the decision of the court of appeals conflicts with decisions of nine other courts of appeals. Those contentions do not warrant this Court's review.

1. a. Petitioner was convicted of conspiring to commit an offense against the United States, in violation of 18 U.S.C. 371. That conspiracy conviction required proof of (1) an agreement between two or more people to pursue an unlawful objective; (2) the defendant's voluntary agreement to join the conspiracy with knowledge of its unlawful objective; and (3) the commission of an overt act by one or more of the conspirators in furtherance of the objective of the conspiracy. See, *e.g.*, *United States* v. *Williams*, 507 F.3d 905, 910 n.4 (5th Cir. 2007), cert. denied, 128 S. Ct. 2074 (2008). The conspiracy conviction did not require proof that petitioner's co-conspirators actually made and passed counterfeit bills in violation of 18 U.S.C. 471 and 472.

It is well established that a conspiracy to commit a substantive crime is a separate and distinct offense from the underlying crime. *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946). The conspirator "must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas* v. *United States*, 522 U.S. 52, 65 (1997). Accordingly, "a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Ibid.* Thus, the basis of a conspiracy charge is the agreement

itself and the defendant's intent. A conspiracy may exist and be punished whether or not the substantive offense was actually committed by the conspirators. That principle remains true even if the goals of the conspiracy were from inception objectively unattainable. See, *e.g.*, *United States* v. *Jimenez Recio*, 537 U.S. 270, 275-276 (2003) (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* §§ 6.5, 6.5(b), at 85, 90-93 (1st ed. 1986)).

b. In light of those principles, the district court did not abuse its discretion in declining to give petitioner's proposed jury instruction, because the issue petitioner raised—whether the conspirators had agreed to make and pass fake bills that another person might think were real—was substantially covered in the jury charge that the district court gave.

As the district court noted, because petitioner was charged only with conspiracy, the government was not required to prove that the fake bills that the conspirators actually made and passed were realistic enough to be "counterfeit." Even if petitioner's co-conspirators had abandoned the plan before completing the manufacturing process—or because the fake bills were of too poor a quality to fool anyone—she and her co-conspirators would still have been guilty of conspiracy if their *intent* had been to make and pass money that could fool someone. The quality of the actual bills was relevant only as evidence of whether they had such an intent in the first place.

The district court's jury charge adequately addressed that issue. The instructions explained that to be "counterfeit" a bill "must have a likeness or resemblance to genuine currency." Pet. App. 5a. The instructions further explained that the defendant must have acted

with "the intent to defraud, that is, intending to cheat someone by *making the other person think that the Federal Reserve notes were real.*" *Ibid.* (emphasis added); see also *ibid.* (defining "intent to defraud" as the intent "to cheat someone by making that person think the Federal Reserve notes were real"). Because the instructions that were given already required the jury to find that petitioner joined a plan to make notes that resembled real currency *and* to make another person think the notes were "real," the jury charge effectively precluded reasonable jurors from convicting petitioner if they believed (as she claimed) that she had intended only to accept bills of "Monopoly money" quality that were too obviously fake to fool anyone. See Pet. C.A. Br. 9. In this context, there is thus no material difference between the court's instructions, which required the jury to find that the conspirators planned to make and pass bills resembling genuine currency with the intent to make someone think they were real, and petitioner's proposed instruction, which required a finding that they planned to make and pass bills with such resemblance to genuine currency as is calculated to deceive an unsuspecting person. See *United States* v. *Bedford*, 536 F.3d 1148, 1155-1156 (10th Cir. 2008) (finding no error when the district court failed to instruct on the elements of the object crime because the instructions as a whole adequately instructed the jury on the requisite criminal intent), cert. denied, 129 S. Ct. 1359 (2009).

c. The court of appeals' conclusion that the district court's instructions adequately covered the issue of the bills' similitude finds support in the Ninth Circuit decision on which petitioner relies (Pet. 13). In *United States* v. *Johnson*, 434 F.2d 827 (1970), the bills were (like the ones in this case) photocopied reproductions of

both sides of genuine bills pasted together. *Id.* at 829. The court said: "While they certainly are not good counterfeits, they are unquestionably imitations of genuine bills which resemble genuine bills and which might, under favorable circumstances, be uttered and accepted as genuine." *Ibid.* That, the court believed, satisfied the test of *United States* v. *Smith*, 318 F.2d 94 (4th Cir. 1963), one of the cases articulating the very definition of counterfeit that petitioner wanted to use. *Johnson*, 434 F.2d at 830; see *United States* v. *Mousli*, 511 F.3d 7, 15 (1st Cir. 2007) (characterizing *Smith*'s similitude requirement as a "low standard"); see also Pet. 13 (endorsing *Smith*). Thus, the *Johnson* court equated the *Smith* test with a requirement that the manufactured bills "must be sufficiently complete to be an imitation of and to resemble the genuine article." *Johnson*, 434 F.2d at 830. That latter formulation is essentially the same as the instruction given to petitioner's jury.

2. Petitioner contends (Pet. 22-24) that the failure to give the more specific instruction on "counterfeit" that she requested was prejudicial because she asserts her agreement with her co-conspirators was limited to accepting only bills that were too obviously fake to fool anyone. Specifically, petitioner argues (Pet. 23 n.8) that her agreement to accept fake money at her register was restricted to the specific bill that she saw at Horton's house, as it appeared at that time. But the evidence indicated that petitioner knew that the money-fabricating process was ongoing at the time petitioner joined the conspiracy. Petitioner told police that Horton had asked petitioner for a real $50 or $100 bill for them to copy. Gov't C.A. Br. 3-4. Moreover, Barrett said that the manufacturing process was not finished when petitioner came over and that the bills she saw were not complete,

as petitioner herself contended on appeal. See Pet. C.A. Br. 9-10.

Thus, both the evidence and common sense indicate that the scope of petitioner's agreement subsumed any further improvements her co-conspirators might have made to the quality of the fake bills. Whether they succeeded in making such improvements made no difference to the scope of the conspiracy, because petitioner's agreement included accepting fake bills that were sufficiently realistic to fool an unsuspecting person.

3. Petitioner contends (Pet. 11-15) that the court of appeals' decision creates a conflict with other courts of appeals over the definition of "counterfeit" in Sections 471 and 472 and the scope of conduct prohibited by those statutes. In petitioner's view, the court of appeals erred by fashioning different tests for the meaning of counterfeit in Sections 471 and 472, on the one hand, and Section 473, on the other. In fact, the decision below does not directly conflict with the decisions petitioner cites, and the asserted conflict does not warrant this Court's review.

The court of appeals' holding was narrow. In a case charging only conspiracy to violate Sections 471 and 472, the court held, the district court did not abuse its discretion because petitioner's proposed, more extensive definition of counterfeit was adequately covered by the court's jury charge as a whole. The court of appeals did not hold that petitioner's instruction improperly defined "counterfeit" under those sections. Indeed, it explicitly assumed that petitioner's proposed instruction was a correct statement of the law. See Pet. App. 14a (holding that the district court's rejection of petitioner's language was not an abuse of discretion "even if we were to assume *arguendo* that hers was a correct statement of law

and that it concerned an important trial point" because "the substance of [petitioner's] proffered instruction was substantially covered by the trial court's charge on the meaning of counterfeit").

In concluding that the instructions as given were sufficient, the court of appeals did note that, if Section 473 had been the object crime of petitioner's conspiracy, then petitioner's more detailed instruction on similitude might have been necessary. Pet. App. 13a. That conclusion, however, was based on the court's observation that Section 473 has a more stringent specific intent requirement—that the bills be perceived by the recipient as "true and genuine." *Ibid.* The court reasoned that a showing of that level of specific intent would require bills with a "substantially greater degree of similitude" than bills that could support proof of the "intent to defraud" that is required under Section 471 or 472. *Ibid.*; 18 U.S.C. 471, 472.

Other courts have similarly stated that the district court's discretion on whether to give a similitude instruction should be informed by the different kinds of intent required under different counterfeiting offenses. In a prosecution for attempting to pass altered currency under Section 472, the Eighth Circuit held that the district court properly refused to give a similitude instruction that was substantially the same as the one petitioner requested here. *United States* v. *Hall*, 801 F.2d 356, 359-360 (1986). In reaching that conclusion, the court noted that a similitude instruction is both "a definition of counterfeit" and "an aid to determining fraudulent intent." *Id.* at 359. The court noted that the instruction was not required in Hall's case because his attempt to pass the note demonstrated his fraudulent intent, while in other cases, especially prosecutions for

mere possession of counterfeit notes, a similitude instruction may be "imperative" because similitude applies to "both definitional and intent aspects" of such cases. *Id.* at 360 n.7; see also *United States* v. *Prosperi*, 201 F.3d 1335, 1343 (11th Cir.) (explaining that the "similitude requirement [was] developed both as a definition, allowing for juries to determine whether a counterfeit document copied its genuine analogue, and as evidence of the defendant's intent to defraud"), cert. denied, 531 U.S. 956 (2000); *Mousli*, 511 F.3d at 15 (recognizing that the possession of counterfeit bills of very poor quality might not support inference of intent to defraud). Thus, because a similitude instruction is relevant both to the definition of "counterfeit" and to establishing a defendant's intent, the observation by the court of appeals in this case that a similitude instruction might have been required if the object crime had a different intent requirement does not create any conflict with cases that discuss similitude as a required attribute of actual bills in prosecutions for substantive offenses.

Petitioner argues (Pet. 20) that the differences between Section 473 and Sections 471 and 472 would require only a different instruction on *intent* and should make no difference to the objective level of similitude that the finished bills must reach. That argument ignores the context of the discussion in the opinion below —namely, a case charging only conspiracy, in which the similitude of the finished bills is relevant only as evidence of the scope of what the conspirators intended to accomplish.

Because the court of appeals' holding was limited to analyzing the sufficiency of the instructions in a pure conspiracy case, it need not be interpreted as addressing the objective level of similitude that actual bills must

attain to be "counterfeit" in cases charging the completed crime. The cases that petitioner claims create a conflict are distinguishable on that basis. In none of those cases was a defendant charged—as petitioner was—only with a conspiracy to deal in counterfeit money. In most of them, there was no conspiracy charge at all. Also, most of those cases did not involve a question about whether a jury instruction amounts to error, and none of them presented the precise instructional issue here.[4] In light of those several differences, the court of

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[4] See, *e.g.*, *Mousli*, 511 F.3d at 11, 14-16 (defendant, charged under Section 472 for possession of counterfeit currency, mounted unsuccessful sufficiency challenge on ground that bills were misshapen, discolored, splotched, and poorly cut; court rejected arguments that there was insufficient similitude under the requested definition and that the bills' poor quality showed lack of intent to defraud; no jury instruction issue); *Prosperi*, 201 F.3d at 1341-1345 (holding that showing of "similitude" is not required to support conviction for making counterfeit securities in violation of 18 U.S.C. 513(a); no conspiracy charge); *United States* v. *Taftsiou*, 144 F.3d 287, 290-291 (3d Cir.) (defendants, charged with conspiracy and substantive offenses under Sections 472 and 473, unsuccessfully challenged evidentiary sufficiency of similitude; no jury instruction issue), cert. denied, 525 U.S. 899 (1998), and 526 U.S. 1020 (1999); *United States* v. *Wethington*, 141 F.3d 284, 287-288 (6th Cir. 1998) (defendant charged under Sections 471 and 472 unsuccessfully challenged sufficiency of evidence of similitude; no conspiracy charge; no analysis of counterfeit definition in jury charge); *United States* v. *Ross*, 844 F.2d 187, 189-191 (4th Cir. 1988) (defendants successfully challenged sufficiency of evidence for substantive convictions under Sections 471 and 472 for photocopy of bill recognized as fake from a distance of 100 feet; no conspiracy charge); *United States* v. *Cantwell*, 806 F.2d 1463, 1469-1471 (10th Cir. 1986) (defendant, charged with conspiracy and with substantive offenses under Section 471 and 18 U.S.C. 474, unsuccessfully challenged sufficiency of evidence on Section 471 count on similitude grounds, even though fake bills were still in uncut sheets; no jury instruction issue); *Hall*, 801 F.2d at 357-360 (defendant charged under Section 472 for attempting to pass "altered," rather than

appeals' treatment of a trial court's refusal to give a requested counterfeit definition in a pure conspiracy case raises no conflict with other circuits that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

"counterfeit," currency; no conspiracy charge); *United States* v. *Brunson*, 657 F.2d 110, 113-114 (7th Cir. 1981) (defendant, charged with conspiracy and substantive offenses under Sections 471, 472, and 474, unsuccessfully challenged jury instruction stating that uncut sheets of bills could be considered counterfeit), cert. denied, 454 U.S. 1151 (1982); *United States* v. *Fera*, 616 F.2d 590, 598 (1st Cir.) (defendant unsuccessfully challenged sufficiency of evidence in prosecution for substantive violation of Section 473; no conspiracy charge), cert. denied, 446 U.S. 969 (1980); *United States* v. *Grismore*, 546 F.2d 844, 849 (10th Cir. 1976) (rejecting defendant's challenge to jury instruction stating that uncut bills could not be counterfeit; no conspiracy charge); *United States* v. *Chodor*, 479 F.2d 661, 664 (1st Cir.) (rejecting defendant's sufficiency challenge to substantive convictions under Sections 472, 473, and 474; no conspiracy charge), cert. denied, 414 U.S. 912 (1973); *Johnson*, 434 F.2d at 828-831 (defendant, charged with passing and possessing counterfeit notes under Section 472, successfully challenged sufficiency of evidence as to some bills; no conspiracy charge; no jury instruction issue); *Smith*, *supra* (defendant, charged under Section 472, successfully challenged sufficiency of evidence where bills showed only one side of a real note, the images and words were faint, and the words were backwards; no conspiracy charge).

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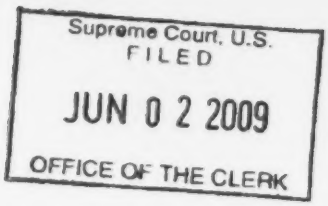

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No. 08-1109

IN THE

Supreme Court of the United States

CRYSTAL PORTER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision below unambiguously holds that 18 U.S.C. §§ 471 and 472, which criminalize the making and passing of counterfeit currency, require that the fake money at issue bear only "a likeness or resemblance to genuine currency" (Pet. App. 11a)—*not* a likeness or resemblance close enough to deceive a person of ordinary intelligence. The decision flatly rejects exactly that heightened degree of similitude, holding that it applies only to prosecutions under 18 U.S.C. § 473, which criminalizes dealing in counterfeit currency. According to the Fifth Circuit, §§ 471 and 472 "do[] not require a particularly high level or degree of similitude," whereas § 473 "requires that the phony bills have a substantially greater level or degree of similitude to the genuine article." Pet. App. 13a; *see id.* at 11a (emphasizing "the distinguishing differences between, on the one hand, the object crimes under §§ 471 and 472 ... and, on the other hand, the object crime under § 473, under which [petitioner] was never charged").

The Government's opposition to certiorari nowhere defends on the merits the Fifth Circuit's reading of §§ 471 and 472 as requiring only a "likeness or resemblance to genuine currency," rather than a *convincing* likeness. Nor does the Government deny that nine other courts of appeals have held squarely the opposite. Pet. 12-15.

Thus tacitly conceding that there are no grounds for opposing review of the Fifth Circuit's *actual* opinion and holding, the Government instead attempts to rewrite the opinion below in a vain effort to obscure its obvious certworthiness. The Government's ar-

guments are merely distracting quibbles with the propriety of this case as a vehicle for resolving the clear conflict created by the decision below. But none of them provides a valid reason to deny review. It is irrelevant that petitioner was charged with conspiracy to make and pass counterfeit obligations under §§ 471 and 472; the key error was in the trial court's failure to instruct the jury properly on the meaning of "counterfeit" in those object offenses, leaving the jury no way to evaluate petitioner's defense that the bills she agreed to pass, while obviously fake, did not qualify as "counterfeit" precisely *because* they were so obviously fake. And it is simply wrong to say the instructions in fact properly advised the jury on the objective similitude requirement; the instruction on that element was incorrect—as the Government implicitly recognizes—and the instruction on the distinct "intent" element could not and did not cure that prejudicial error. For these reasons, there is no merit to the Government's ultimate suggestion that the decision below "need not be interpreted," Gov. Br. 14, as holding what it so plainly holds, *viz.*, that §§ 471 and 472 require only that the bills at issue bear *some* resemblance or likeness to genuine currency, not a *convincing* one.

Certiorari should be granted.

1. The Government primarily argues that review is unwarranted because petitioner was charged only with *conspiracy* to commit the object offenses of making and passing counterfeit currency under §§ 471 and 472. Because "the basis of a conspiracy charge is the agreement itself and the defendant's intent," the Government observes, a conspiracy "may exist and be punished whether or not the substantive of-

fense was actually committed by the conspirators." Gov. Br. 8-9. Thus, argues the Government, even if the bills actually passed by petitioner and her co-conspirators were too pathetic to deceive a person of ordinary intelligence, she was still guilty of conspiracy if she intended to pass *better* bills, i.e., bills that satisfied the higher standard of §§ 471 and 472. *Id.* at 9.

But that, of course, is the problem. Petitioner's central defense was that she did *not* agree to pass better bills, but only the amateurish bills she was shown at her co-conspirators' home. As the Government concedes, petitioner could be convicted of conspiracy only if the *particular act she agreed to commit* "would satisfy all of the elements of a substantive criminal offense." *Id.* at 8 (quoting *Salinas v. U.S.*, 522 U.S. 52, 65 (1997)). Because petitioner was charged with conspiracy to make and pass counterfeit notes under §§ 471 and 472, the Government was required to prove that she agreed to pass bills that would qualify as "counterfeit" under those statutes. If what she agreed to pass were bills that did *not* qualify as counterfeit, as petitioner vigorously insisted at trial, then she is not guilty of conspiracy.

The Government contends that the evidence would support a finding that petitioner did agree to pass bills that could qualify as counterfeit under §§ 471 and 472. Gov. Br. 11-12. But there is no way to know that a *properly instructed* jury would have made that finding. The facts of this case amply support the inference that the conspirators' design from the outset was to make purchases with merely fake bills using a person on the inside *who did not need to be deceived* by high-quality fakery. Pet. 3-5. Indeed,

the entire point of bringing petitioner into the conspiracy in the first place was her co-conspirators' understanding that the laughably amateurish bills—color-copied on manila paper glued together, with "magnetic strips" drawn on—were unlikely to fool an ordinary, unsuspecting person. Pet. 3-4.[1] Without a correct instruction on the meaning of "counterfeit," petitioner's jury was unable to distinguish between a plan to make and pass *fake* bills (which is not a federal crime) and a plan to make and pass *counterfeit* bills (which is). With a proper instruction, the jury easily could have found "that the specific bills she agreed to pass were not sufficiently real to qualify as counterfeit." Pet. App. 22a (Haynes, J., dissenting).

2. There is even less merit to the Government contention that the jury *was* accurately instructed, in substance, on the objective similitude requirements of §§ 471 and 472. Gov. Br. 9-11. As Judge Haynes observed below: "Simply by looking at the given instruction on the general meaning of 'counterfeit' and the rest of the charge as a whole, it is clear that [petitioner's] proffered instruction was not substantially covered." Pet. App. 19a. The Government's theory rests entirely on the instructions' description of the *intent* element under §§ 471 and 472. According to the Government, even though the trial court failed to instruct the jurors that a bill qualifies as counterfeit only when it bears a *convincing* likeness, the jurors nevertheless understood essentially the same point, because the intent charge for §§ 471

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[1] *See also, e.g.*, RE 38 (testimony of E. Horton) ("You would have to know somebody to pass the money off to.... [Y]ou could tell it was fake[, so i]t would have to be somebody you know.").

and 472 described the required "intent to defraud" as "intending to cheat someone by making the other person think that the Federal Reserve notes were real." Pet. App. 5a; *see* Gov. Br. 10.

The Fifth Circuit did not accept the Government's argument that the intent instruction adequately covered the objective similitude requirement. Doing so would only have compounded its error, because relying on the intent element to substitute for a stringent similitude requirement misses the entire point of the federal counterfeiting laws—"the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals." *Prussian v. U.S.*, 282 U.S. 675, 678 (1931); *see* Pet. 17. Criminal liability for making or passing counterfeit money thus requires not only that the person *intend* that the notes be taken as genuine, but *also* that the notes *actually appear convincingly genuine*, for only the latter, objective similitude element reflects the statutes' concern for protecting the monetary system. Under the jury's instruction below, however, a person could be convicted of making and passing any low-quality fake bills merely so long as the person *thought*—sensibly or not—her scheme would trick the person into thinking the bills were real. Thus, for example, the conspirators here apparently believed petitioner needed only to receive something vaguely resembling genuine currency at her register, and that her employer would not inspect the bills closely or trace them back to her register. That kind of petty fraud simply does not create the problem the counterfeiting offenses target, and failing to give a proper instruction on the meaning of "counterfeit" allowed the

jury to convict petitioner of conspiring to commit an act that does not constitute a federal crime.

The Government asserts that *U.S. v. Johnson*, 434 F.2d 827 (9th Cir. 1970), supports its contention that the jury's instructions "adequately covered the issue of the bills' similitude." Gov. Br. 10. But *Johnson* does not suggest in any way that the stringent similitude requirement of §§ 471 and 472 may be smuggled in through the back door of the intent element, as the Government contends. To the exact contrary, *Johnson* expressly invokes the similitude standard rejected by the Fifth Circuit here, *viz.*, whether the counterfeit bills "bear such a likeness or resemblance to genuine currency 'as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.'" *Johnson*, 434 F.2d at 829 (quoting *U.S. v. Weber*, 210 F. 973 (W.D. Wash. 1913)). Applying that rule, the *Johnson* court affirmed the defendant's conviction for one set of bills and reversed it for another. *Id.* at 829-30. In the part of the opinion reversing the conviction—for bills that were printed in "bad" ink on "only one side" of "poor paper" with a "pinkish color," *id.* at 829—the court explained that a conviction under § *474* may be proper for an incomplete note, but "[u]nder section 472 ... the counterfeit obligation of the United States must be sufficiently complete to be an imitation of and to resemble the genuine article." *Id.* at 830. Remarkably, the Government represents the latter passage to be *Johnson*'s statement of § 472's similitude requirement, which the Government describes as "essentially the same as the instruction given to petitioner's jury." Gov. Br. 11.

But in context the court's point is clear: manufactured bills must be sufficiently complete to "resemble" genuine currency *under the stringent § 472 standard*. The Government's contention that *Johnson* endorses the weaker mere "resemblance" standard applied below (*id.*) blatantly misreads the decision.

3. Finally, the Government suggests that some other decisions have agreed with the Fifth Circuit that §§ 471 and 472 require a different kind of intent from other counterfeiting offenses, which in turn shows that §§ 471 and 472 require a lower degree of similitude. Gov. Br. 13. The Government is wrong—no other circuit has adopted the Fifth Circuit's erroneous downgrading of the similitude required for §§ 471 and 472. In the decisions cited by the Government, courts merely observed that a high degree of similitude may support an inference of the "intent to defraud" required under §§ 471 and 472 when the defendant was caught in possession of fake bills, whereas "mere possession of a counterfeit bill of very poor quality might not give rise to such an inference," since "poor quality suggests that it would be unlikely to be accepted in a transaction." *U.S. v. Mousli*, 511 F.3d 7, 15 (1st Cir. 2007); *see U.S. v. Hall*, 801 F.2d 356, 359-60 (8th Cir. 1986).[2] But here

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[2] As the district court's instructions below recognized, the "intent to defraud" element of §§ 471 and 472 is functionally equivalent to the § 473 element requiring the defendant to intend that the note be passed as "true and genuine." *See* Pet. App. 5a (describing "intent to defraud" element of §§ 471 and 472 as intent to "cheat someone by making the other/that person think the Federal Reserve notes were real"). Section 473 does not employ the "intent to defraud" formulation, however,

the Fifth Circuit drew the *opposite* conclusion—that the defendant's intent should define the level of objective similitude required to qualify as "counterfeit." That conclusion is wrong on its own terms, *see* Pet. 19-22, and, unsurprisingly, none of the cases cited by the Government supports it in the least.

The Government's discussion of *Hall* illustrates the Government's mischaracterization of the conflicting precedents. The Government notes that the defendant in *Hall* was denied a similitude instruction similar to the instruction sought by petitioner here. Gov. Br. 13. What the Government fails to acknowledge, however, is that the court affirmed the denial of the instruction specifically because the defendant was charged with passing *altered* currency, *not* "counterfeit" currency. Altered currency, the *Hall* court emphasized, "simply is not synonymous with an obligation made after the similitude of any obligation of the United States." 801 F.2d at 360; *see id.* at 360 n.7 (explaining that "[s]imilitude has come to be synonymous with counterfeit," not altered). *Hall* thus does nothing to excuse the failure to provide an accurate similitude instruction in a case involving an alleged conspiracy to make and pass counterfeit notes.[3]

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because it prohibits *dealing* counterfeit notes, i.e., buying and selling them. A person who sells or buys counterfeit notes does not intend to defraud the counterparty by tricking him into thinking the notes are real. The statute thus requires instead that the defendant buy or sell the notes with the intent that the notes *later* be "passed, published, or used as true and genuine." Pet. 2.

[3] To the extent the Government suggests that the Fifth Circuit's holding is muted by the abuse of discretion standard the

The Government's sweeping, string-cited dismissal of other precedents conflicting with the decision below fails to identify any legitimate basis for distinguishing them. The Government's main argument is that none of them charged a conspiracy. Gov. Br. 15. As already discussed, however, the conspiracy context is irrelevant—the instructional error in describing the object offenses precluded the jury from fairly deciding whether *the acts petitioner conspired to commit* constituted any federal crime. *See supra* at 3-4. The Government's claim that because of the conspiracy charge, the decision below "need not be interpreted as addressing the objective level of similitude that actual bills must attain to be 'counterfeit' in cases charging the completed crime," Gov. Br. 14-15, is simply inexplicable. The court's holding could hardly be clearer: "[B]ecause the object crimes for [petitioner's] conspiracy were those enumerated in §§ 471 and 472 [rather than § 473], the district court sufficiently defined 'counterfeit' in the instruction that it gave to the jury." Pet. App. 14a; *see id.* at 13a. That holding squarely addresses the object offenses and affirms the trial court's in-

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court applied to its review of the instructions given, *see* Gov. Br. 12, the argument is meritless. The court of appeals' conclusion that the district court was "within its discretion" in rejecting petitioner's proposed instruction was predicated on its conclusion that "the district court sufficiently defined 'counterfeit' in the instruction that it gave to the jury." Pet. App. 14a. That is, the court held not that the charge was in the right ballpark, but that it was *legally correct*. *Cf. Koon v. U.S.*, 518 U.S. 81, 100 (1996) (district court "by definition abuses its discretion when it makes an error of law"). That holding creates a conflict with other courts of appeals on the proper meaning of "counterfeit" for purposes of §§ 471 and 472.

struction defining "counterfeit" under those offenses; the conspiracy context has nothing to do with it.[4]

The Government's other basis for distinguishing the conflicting precedent is that many did not address instructional error, but instead considered whether the trial evidence sufficed to meet the legal definition of "counterfeit." Gov. Br. 15. But the question of the proper scope of a criminal offense routinely arises through alleged instructional error, *see, e.g.*, *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 704-08 & n.10 (2005), and the Government does not even begin to explain why a decision declaring and applying a legal standard to the evidence would not also define the standard that should be given to the jury in its instructions.

The unavoidable fact is the Fifth Circuit has broken decisively from a longstanding consensus in the

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[4] Nor did the court reach its holding on the basis of an assumption that petitioner's view of the law under §§ 471 and 472 is correct, as the Government contends. Gov. Br. 12. In the very last passage of its analysis, only *after* having held that §§ 471 and 472 do not require the same high level of similitude that § 473 requires, the court observed that the district court acted "within its discretion in declining to adopt [petitioner's] proffered language, and "[t]his would be so even if we were to assume *arguendo* that hers was a correct statement of the law." Pet. App. 14a. The court provided no explanation why, but it appears to be referring to petitioner's "statement of the law" *as to § 473*. In other words, petitioner may be right that "counterfeit" means a convincing resemblance to genuine currency *under § 473*, but because she was charged with object offenses under §§ 471 and 472, which (in the court's view) require a lower degree of similitude, "the trial court's charge on the meaning of 'counterfeit'" was sufficient even if petitioner's view of the law is correct. Pet. App. 14a.

federal courts over the meaning of "counterfeit" under §§ 471 and 472. In the Fifth Circuit, "counterfeit" in those statutes means merely "hav[ing] a likeness or resemblance to genuine currency." Pet. App. 11a. That standard will apply not only to appellate review for sufficiency of the evidence, but also to the juries who must review the evidence in the first instance. In other circuits, juries and appellate panels apply a different, higher standard in determining whether the bills made or passed by the defendant qualify as "counterfeit" under §§ 471 and 472. The resulting differential treatment of similarly situated defendants is unfair and should not be tolerated.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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